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NO. 82-783

In the Supreme Court of the United States

OCTOBER TERM, 1982

STANLEY M. DIEFENTHAL AND
ELKA F. DIEFENTHAL,
Petitioners

versus

THE CIVIL AERONAUTICS BOARD AND
EASTERN AIRLINES, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Aeronautics Board erred in concluding that the smoking regulations were valid, and thereby dismissing the Diefenthals' Petition for Rulemaking to Eliminate 14 CFR 252.

2. Whether the Appeals Court erred in dismissing Eastern and concluding there was no private right to action.

3. Whether this Court will sanction the unequal treatment of similarly situated parties by the Federal courts.

LIST OF INTERESTED PARTIES

Counsel of record for Stanley M. Diefenthal and Elka F. Diefenthal certifies and represents, in order that the Justices of the Court may evaluate possible disqualification of recusal, that the parties in the United States Court of Appeals for the Fifth Circuit are:

1. Stanley M. Diefenthal
2. Elka F. Diefenthal
3. The Civil Aeronautics Board
4. Eastern Airlines, Inc.
5. Southeastern Aviation Underwriters, Inc.
6. Terminal Sales Company
7. Eastern Airlines of Puerto Rico, Inc.
8. Eastern Airlines, S.A.
9. Dorado Beach Development, Inc.
10. Dorado Beach Estates, Inc.

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OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals affirming the District Court's judgment against Petitioners appears in Appendix A to this Petition and is reported at __ F.2d __, Slip Op. Nos. 80-3259 and 80-3761 (5th Cir. Aug. 6, 1982). A Petition for Rehearing was not filed. The Judgments of the District Court appear in Appendix B and C. No opinion was issued or reported.

JURISDICTION

The Fifth Circuit's Opinion and Judgment of August 6, 1982, affirming the District Court's judgment against

Petitioners is set forth in Appendix A. Rehearing was not requested. This Petition for Certiorari is being filed within the prescribed period of ninety (90) days after August 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The text of the Statutes and Regulations herein can be found at Appendix D.

STATEMENT OF THE CASE

Stanley and Elka Diefenthal ("Diefenthals") filed suit on August 2, 1979, naming as defendants Eastern Airlines, Inc. ("Eastern") and the Civil Aeronautics Board ("CAB"). Diefenthals claimed damages for injuries sustained while passengers aboard Eastern Flight 556 from New Orleans, Louisiana to Philadelphia, Pennsylvania. Diefenthals sought recovery against Eastern for breach of contract and tortious conduct which had occurred and further requested injunction relief to prevent future incidents from occurring. Diefenthals further alleged that the CAB acted outside the scope of its authority in promulgating 14 CFR 252 and sought to have the Court declare this regulation invalid.

The incident which prompted this suit occurred on May 18, 1978. Several days prior to boarding Eastern Flight 556, Diefenthals had made reservations with

Eastern, specifically requesting first class seats in the smoking section of the aircraft. These reservations were reconfirmed thirty minutes prior to boarding the aircraft. However, when Diefenthals boarded the aircraft they were instructed to sit in the nonsmoking section of the first class compartment. Diefenthals explained that they had been guaranteed smoking seats in the first class section, but despite their explanation the Eastern attendant brusquely dismissed their complaint.

As a result, Diefenthals were deprived of being able to smoke on the flight. In addition, the arbitrary and antagonistic manner in which the flight attendant acted toward the Diefenthals caused them extreme embarrassment, humiliation and emotional distress. Later, petitioners overheard the flight attendants making negative comments to other passengers in the flight regarding their desire to smoke while on board the aircraft.

The CAB subsequently filed a motion to dismiss in the District Court, which was granted on August 31, 1979.

On September 17, 1979, Eastern filed a motion to dismiss on the grounds that the Diefenthal complaint failed to state a claim upon which relief could be granted. The motion was argued before Judge Morey Sear on November 21, 1979. On January 30, 1980, the trial court dismissed Eastern for lack of jurisdiction. It found that there was neither an express nor implied private right of action under the Federal Aviation Act ("the Act"), 49 USC §§1301-1551.

Subsequently, on February 13, 1980, Diefenthals filed a petition for rulemaking to eliminate Regulation 14 CFR 252 with the CAB. This petition requested the CAB to eliminate 14 CFR 252 on the grounds that the Regulation was invalid and beyond the scope of the CAB regulatory powers. On April 14, 1980, the CAB dismissed Diefenthals' action.

Appellants appealed both the decision of the District Court in dismissing Eastern and the dismissing of the Petition for Rulemaking by the CAB. These appeals were consolidated in the appeal to the United States Court of Appeals, Fifth Circuit.

On August 6, 1982, the Court of Appeals, Clark, Chief Judge for the Fifth Circuit affirmed the lower court's ruling and held that:

> (1) regulating smoking falls within requirement that carrier provide "adequate service";
>
> (2) Airline Deregulation Act of 1978 did not abrogate authority to require carriers to provide nonsmoking areas;
>
> (3) there was no private right of action to enforce requirement of "adequate service";
>
> (4) even if an implied right of action exists under the unjust discrimination provision, denying passengers the right to smoke did not contribute such discrimination; and
>
> (5) even if stewardess intended to humiliate

plaintiffs by brusquely telling them there were no vacant seats in the smoking section the contract and tort claims did not meet the $10,000 diversity jurisdiction threshold.

Diefenthals did not file a petition for rehearing.

Diefenthals now seek relief from this Court.

REASONS FOR GRANTING THIS WRIT

FIFTH CIRCUIT SHOULD NOT HAVE AFFIRMED CAB RULING; CAB LACKS AUTHORITY TO REGULATE SMOKING

The CAB in 1972 promulgated 14 CFR §252 for the purpose of regulating smoking on commercial aircraft. Specifically, Part 252 requires all commercial air carriers to establish segregated smoking and non-smoking sections. Petitioners contend that the CAB did not have the authority to promulgate these regulations since there is nothing in the Act which authorized regulation in this area.

The *Congressional intent* in creating the CAB was solely to *regulate* the *economic aspects* of the airline industry. Congress, in enacting the Act, never intended to vest and did not vest in the CAB the authority to act or enforce non-economic regulations such as Part 252. As is the case with all federal regulatory agencies, the CAB has no legislative powers aside from those powers which were granted to it by Congress under the Act. *American Overseas Airlines, Inc. v. CAB,* 254 F.2d 744 (D.C. Cir.

1950).

As was stated by the Supreme Court of the United States, "The Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what the Congress has said it can do." *CAB v. Delta Airlines, Inc.*, 367 US 316, 322 (1951).

When the CAB enacted Part 252, it based its authority for such requirements on Sections 204(a) and 404(a) of the Federal Aviation Act, 49 U.S.C. 1324(a), 1374(a). Neither of these sections allow the Board to regulate smoking and nonsmoking. Additionally, and perhaps more importantly, Section 401(e)(4), 49 U.S.C. 1371(e)(4) prohibits the Board from restricting a carrier's accommodations, like Part 252, in fact, does.

Section 204(a) of the Act sets forth the Board's general powers, and allows the Board to promulgate regulations:

> ...pursuant to and consistent with the provisions of this act, as it shall deem necessary to carry out the provisions of this act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under the act.

This section, standing alone, does not constitute an independent substantive basis for rulemaking. *Deutsch Lufthansa Aktiengesellschaft v. CAB*, 479 F.2d 912, 918 (D.C. Cir. 1973). This section merely provides enabling power, which give the CAB the power to act pursuant to

duties conferred by other sections of the Act.

Section 404 imposes two separate duties on carriers. First, the air carriers must provide safe and adequate service, equipment and facilities in interstate and overseas air transportation. Second, air carriers must establish, observe and enforce just and reasonable classifications, rules, regulations and practices relating to rates, fares and charges for air transportation. Nothing in Section 404 leads to the conclusion that the CAB has the authority to regulate smoking aboard aircraft.

The language in Section 404 regarding the adequacy of service does not confer on the CAB the authority to regulate smoking on aircraft. The term "service" in Section 404(a)(1) does not relate to the *quality* of cabin service, accommodations or conditions of passenger comfort. This term has consistently been interpreted to apply only to airline schedules. CAB Order 78-14-121, page 50.

Furthermore, the CAB's smoking regulations conflict with Section 404(b) of the Federal Aviation Act, 49 USC 1374(b), which prohibits unjust and unreasonable discrimination against individual passengers or groups of passengers traveling on commercial aircraft. Section 404(b) specifically provides as follows:

> No air carrier or foreign air carrier shall...subject any particular person...in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage....

The courts have held that this provision bans all forms of unjust and unreasonable discrimination, including those granting priorities for boarding on overbooked flights, and those resulting in fare differentials. *Archibald v. Pan American World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972), and *Transcontinental Bus System v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. den.*, 390 US 920 (1968).

The unjust and unreasonable discrimination against smoking passengers contained in the CAB's present regulations concerning smoking violates Section 404(b) of the Act. Non-smokers are guaranteed seats in non-smoking sections, but smokers cannot be assured of seats in smoking sections. Insofar as smoking regulations are concerned, adequate service appears to have been interpreted by the CAB to mean satisfaction for a small group of anti-smoking passengers even to the point of tolerating discriminatory treatment toward smoking passengers.

The Fifth Circuit notes that its scope of review is limited when an agency has determined that its regulation is necessary to carry out its statutory mandate. However, the question of smoking versus non-smoking does not fall within the mandate, and the CAB has no authority in this area. As was pointed out before, "adequate service" has consistently referred to adequate scheduling of flights.

The Fifth Circuit did comment that the CAB has consistently treated the quality of service as a component of "adequate service" since 1973, but cited no authority.

THE COURT OF APPEALS' AFFIRMANCE OF THE TRIAL COURT'S DETERMINATION THAT THERE EXISTED NO PRIVATE RIGHT OF ACTION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS

Eastern claims and the Fifth Circuit has agreed that Petitioner has no private right of action against them for their enforcement of an invalid regulation and for their failure to comply with their own manual promulgated pursuant to CAB Regulations 14 CFR 252. Eastern and the Fifth Circuit contend that the statutes and regulations which govern the airline's treatment of smokers and non-smokers aboard aircraft do not provide a private right of action. Petitioners contend that although there is no private right of action statutorily provided, the Fifth Circuit should have implied a private right of action pursuant to the Act. Their reluctance to do so is in clear conflict with decisions of other circuits addressing similar situations.

The Diefenthals have shown that they established an implied right of action by meeting the four factors noted in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). That four-prong test established by the U.S. Supreme Court is:

1. Does the statute intend to protect this class of person from this harm?

2. Did the legislature indicate any intent to create or deny a privacy remedy?

3. Would the private remedy be consistent with

the legislative goals?

4. Is the cause of action one traditionally left to State law?

The CAB regulations clearly intend to protect not only the non-smoker, but also the smoker. The harm which the statute protects against is not merely infringement on non-smokers' rights, but infringement on *either* the smoker or non-smoker's ability to travel on the airplane in a manner suitable to him.

Although Congress did not expressly create a private right of action under the Act, neither did it preclude such a right. Jurisprudence in Federal courts has in fact implied several private rights of action emanating from violations of the Federal Aviation Act. As stated in *Town of Easthaven v. Eastern Airlines,* 282 F.Supp. 507 (USDC Conn. 1968):

> Under the law it is clear that a violation of the provision of the Federal Aviation Act in the Regulations or Rules issued pursuant thereto may give rise to a private federal right of action maintainable by those injured by the violation. *Id.* at 513.

An example of other circuits finding implied private right of action under the Act is the case of *Fitzgerald v. Pan American Airways,* 229 F.2d 499 (2nd Cir. 1956), where the plaintiff brought suit against Pan Am for refusal to transport him due to his race. In addition, the D.C. Cir-

cuit found an implied private right of action for a passenger who was "bumped" and allowed suit to be brought pursuant to 49 U.S.C. §1374 in *Nader vs. Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975).

As to the third prong, the Court erroneously took the position that since Congress had delegated the authority to the CAB to promulgate regulations to enforce the Act, the CAB is the only agency capable of securing specific compliance with the regulations. To the contrary, the courts have implied private rights of action for violation of other provisions of the Act, despite the fact that the CAB was empowered by Congress to enforce compliance with the statutes. The mere fact that the CAB has the power to enforce its regulations does not mean that one is precluded from recovering damages when injury results as a consequence of violation of a regulation.

The final element of the test put forth in *Cort v. Ash, supra*, is whether the issue before the Court is one traditionally delegated to state law so as to prevent the Federal court from interfering in the area. Defendants contend and the Fifth Circuit apparently agrees that Diefenthals' claim rests with traditional notions of state law. It is difficult to imagine a case more appropriate for a decision from a Federal court than this one. Petitioners are claiming damages from Eastern due to injuries received when Eastern violated a Federal statute by failing to follow its manual. The Federal Government through its administrative body, the CAB, is responsible for the regulations of

interstate aviation. The state has no authority to regulate in this area, and consequently, the state courts are not the proper forum to decide questions of statutory interpretation involving Federal statutes. This case directly involves Federal statutes and regulations and requires the expertise of a Federal court to determine the issues presented.

In sum, the *Cort v. Ash, supra*, test has been met and the Fifth Circuit erred in not finding an implied private right of action. The Fifth Circuit's ruling is contrary to those of other Circuits, as has been previously shown. Implied private rights of action have been found in similar fact situations.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the U.S. Court of Appeals, Fifth Circuit.